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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 266

LELIA MAE SANKS nee JONES, et al.,

Appellants,

v.

GEORGIA, et al.,

Appellees.

On Appeal from the Supreme Court of Georgia

BRIEF OF THE STATE OF GEORGIA (an Appellee)

PART I

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provision

The federal constitutional questions presented to and decided by the Supreme Court of Georgia relate solely to the Fourteenth Amendment, and this Amendment, correctly cited in Appellants' brief, is the sole constitutional provision involved in the instant appeal.

Statutory Provisions

Appellants correctly cite two specific provisions of Georgia's dispossession statutes which they claim to be unconstitutional. Such provisions, however, are but a portion of the entire statutory treatment of the subject. The State of Georgia considers that the omitted statutes are also pertinent to evaluation of Appellants' contentions. The statutory procedure in its entirety is as follows:

Ga. Code Ann. § 61-301

> "*Demand for possession; proceedings on tenant's refusal to deliver.* — In all cases where a tenant shall hold possession of lands or tenements over and beyond the term for which the same were rented or leased to him, or shall fail to pay the rent when the same shall become due, and in all cases where lands or tenements shall be held and occupied by any tenant at will or sufferance, whether under contract of rent or not, and the owner of the lands or tenements shall desire possession of the same, such owner may, by himself, his agent, attorney in fact or attorney at law, demand the possession of the property so rented, leased, held, or occupied; and if the tenant shall refuse or omit to deliver possession when so demanded, the owner, his agent or attorney at law or attorney in fact may go before the judge of the superior court or any justice of the peace and make oath to the facts."

Ga. Code Ann. § 61-302

> "*Warrant for tenant's removal.* — When the affidavit provided for in the preceding section shall be made, the officer before whom it was made shall grant and issue a warrant or process directed to the sheriff, or his deputy, or any lawful constable

of the county where the land lies, commanding and requiring him to deliver to the owner or his representative full and quiet possession of the lands or tenements mentioned in the affidavit, removing the tenant, with his property found thereon, away from the premises."

Ga. Code Ann. § 61-303

"*Arrest of proceedings by tenant; counter-affidavit and bond.* — The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Ga. Code Ann. § 61-304

"*Issue tried in superior court.* — If the counter-affidavit and bond provided in the preceding section shall be made and delivered to the sheriff or deputy sheriff or constable, the tenant shall not be removed; but the officer shall return the proceedings to the next superior court of the county where the land lies, and the fact in issue shall be there tried by a jury."

Ga. Code Ann. § 61-305

"*Double rent and writ of possession, when.* — If the issue specified in the preceding section shall

be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises."

Ga. Code Ann. § 61-306 (Ga. Laws 1968 pp. 124, 125)

"*Four days' notice to tenant, etc.* — Whenever a warrant shall be sued out, under existing laws, for the eviction of any person as an intruder, or as a tenant holding over, it shall be the duty of the officer in whose hands such warrant may be placed to exhibit the same at once to the defendant, and to give him notice that after the expiration of four days (not counting Sundays or public holidays) said officer will proceed with the execution of such warrant; and unless a counter-affidavit, as provided by law, is filed with said officer within that time, and, in case of tenants holding over, unless bond with good security payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case, shall at the same time be given by the tenant as now required by law, it shall be his duty to proceed forthwith to execute said warrant.

Provided, however, that if the officer is unable to personally notify the defendant notice may be given by delivering same to any person sui juris residing on the premises, or if no person is found on the premises, by tacking a notice on the door of the house situated on said premises; and same shall be deemed sufficient notice.

Provided, further, that if the defendant absconds and has any of his (or her) goods and properties located in a house situated on the premises, it shall be the duty of the officer to break and enter said house for the purpose of removing therefrom the defendant's goods and properties at the expiration of four days after notice (not counting Sundays and public holidays) as heretofore provided."[1]

Ga. Code Ann. § 61-307

"*Officer failing in duty to give notice to tenant.* — Any officer violating the provisions of the preceding section, by failing to give the notice therein required, or by executing any such warrant as is therein named before the expiration of three days from the time of said notice, shall be deemed guilty of a trespass, and liable, together with the sureties on his official bond, in damages to the defendant."

Ga. Code Ann. § 61-308

"*Applicability of Chapter to croppers and servants after termination of employment.* — The provisions of this Chapter shall apply to croppers and servants who continue to hold possession of lands and tenements after their employment as such has terminated, in the same manner as it relates to tenants."

QUESTIONS PRESENTED

1. Whether the bond posting requirement of Ga. Code Ann. § 61-303 is violative of any right secured to tenants, and in particular indigent tenants, by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution?

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[1]In counties having a population of 500,000 or more, the required notice is six days. See Ga. Laws 1968, pp. 1215-1216.

2. Whether the "double rent" measure of damages fixed by Ga. Code Ann. § 61-305 is violative of any right secured to tenants, and in particular indigent tenants by the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution?

STATEMENT

The instant appeal is taken from a unanimous decision of the Supreme Court of Georgia reported *sub nom. State of Georgia v. Sanks nee Jones, et al.*, 225 Ga. 88, 166 S.E.2d 19 (1969). The unanimous decision of Georgia's highest court reversed an order entered by the Civil Court of Fulton County in three cases which had been consolidated for hearing before the trial court.

The facts, in all relevant particulars the same for each case, may be stated as follows: A dispossessory warrant was taken out by a landlord to regain possession of his property from a tenant who had failed to pay rent [A. 3, 18]. Rather than following the statutory procedure for arresting dispossessory proceedings (i.e. Ga. Code Ann. § 61-303), the tenant in each case filed an application for rule nisi, alleging that Ga. Code Ann. § 61-303 was unconstitutional on its face, and also as applied to her in that her inability to post bond denied her access to the courts to contest the dispossession [A. 5-6, 20-21]. Each of the applications for rule nisi further contended that Ga. Code Ann. § 61-305 was also unconstitutional in that any Georgia tenant desiring to exercise his "right to be heard" would have to run the risk of losing a double-rent judgment if his defense proved to be inadequate [A. 6, 21]. Tenants' constitutional contentions were based upon both the

"due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution and upon the corresponding provisions of the Constitution of the State of Georgia of 1945 [A. 6, 21, 28].

In each case, the Civil Court of Fulton County entered an order on the application for rule nisi directing the landlord and the Chief Marshal of Fulton County to show cause why the tenant should not be allowed to proceed without posting bond pursuant to Ga. Code Ann. § 61-303, and without subjecting herself "to the penal rent provisions" of Ga. Code Ann. § 61-305 [A. 7-8, 22-23]. The State of Georgia was duly served, and while deeming itself to be a statutory party to any and all State court actions seeking to declare enactments of its General Assembly unconstitutional (see Ga. Code Ann. § 110-1106), formally moved for leave to intervene in each of the dispossessory proceedings in order to eliminate any question as to its being a party of record. The trial court entered an order granting the State's motion, consolidating the three cases for hearing, and ordering that the tenants be allowed to remain on the premises until further order of the court, provided that they pay the rent into the registry of the court as it became due [A. 24-25]. An evidentiary hearing was held in the matter on June 5, 1968, at which time evidence was adduced by the tenants tending to show that it was extremely difficult for persons without means to secure the bond called for by statute [A. 11]. The evidence submitted by the tenants further showed that during 1967 only 13 of the approximately 19,000 dispossessory warrants issued by the Civil Court of Fulton County were contested [A. 38]. No evidence was in-

troduced, on the other hand, to show whether this small percentage of contested dispossessory warrants was due to difficulty in securing a bond, or due to the fact that tenants, in the vast majority of cases, simply recognized they had defaulted through failure to pay rent or otherwise, and in fact had no non-frivolous defenses. The constitutional questions were argued by counsel and on October 2, 1968, the Civil Court of Fulton County rendered its decision in a 14-page opinion [A. 27-39]. After noting that the evidence showed that the tenants were indigent and unable to obtain bonds [A. 38], and after saying that the bond posting requirement of the statute was "an unconstitutional and unconscionable deprivation of the fundamental right to be heard where the defendant is unable to post such a bond" [A. 38], the Civil Court concluded:

> "It is the ruling of this Court that Code Section 61-303 being codified from Act of the General Assembly of 1827, as amended, and Code Section 61-305, being codified from the Act of the General Assembly of 1827, as amended, are unconstitutional insofar as said statutory provisions require tenant as a precondition to the defense of his case to tender a bond with good security, payable to the landlord for the payment of such sums, with costs, as may be recovered against him on the trial of the case; and insofar as said statutory provisions permit a landlord to recover from the tenant an amount equal to double the rent that may become due from date of the issuance of the warrant" [A. 39].

It was ordered that defendant tenants be allowed to file any and all defenses they might have without first posting bond and without being subjected to the "double rent" provision of Ga. Code Ann. § 61-305 [A. 38].

The order also required the tenants to continue their rental payments into the registry of the court [A. 38-39] and when one of the three tenants subsequently failed to comply with this condition, an order was entered, on October 9, 1968, allowing the Marshal to proceed with her eviction.[2]

Attempting to act with dispatch because of the large number of cases in which the issues were being raised and because of the many cases being held in abeyance pending final judicial determination of the case at bar, the State of Georgia, on October 8, 1968, filed its notice of appeal to the Supreme Court of Georgia.

Upon appeal, the Supreme Court of Georgia, noting that it would be an extremely unusual circumstance for an owner of rental property to attempt to oust a tenant who was in fact complying with the terms of his lease, noting further that the limited matters to which statutory dispossessory proceedings applied (i.e. failure to pay rent, holding over, or holding as a tenant at will or sufferance) were matters which should be within the knowledge of the tenant, and observing that rich as well as poor are to be accorded protection under the "equal protection" clause of the United States Constitution, unanimously held that the bond requirement was not only reasonable, but entirely appropriate and equitable to guarantee payment by one who occupies another's property, enjoying the use and benefit thereof, while he resists dispossession. *State of Georgia v. Sanks, et al.*, 225 Ga. 88, 166 S.E.2d 19 (1969) [A. 40-43]. Ten-

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[2]I.e., *Lillie Allison* (Warrant No. 69, 418 in the Civil Court of Fulton County).

ants' motion for rehearing was denied without further comment by the Supreme Court of Georgia [A. 44].

Probable jurisdiction was noted by this Court on June 23, 1969 [A. 45].

PART II

ARGUMENT AND CITATION OF AUTHORITIES

1. *The bond posting requirement of Ga. Code Ann. § 61-303 is a reasonable method of protecting valuable property rights of owners of rental property against irreparable injury and is not violative of any right secured to a tenant, indigent or otherwise, under the "due process" or "equal protection" clauses of the United States Constitution.*

Ga. Code Chapter 61-3 affords an owner of rental property with a summary procedure for recovery of the same where a tenant fails to pay rent, holds over, or for any reason is a tenant at will or sufferance. The summary nature of the procedure is quite obviously intended to lessen the possibility of irreparable financial loss to the owner by such things as "free rent" to a tenant during protracted litigation. In the absence of provision to the contrary, it is an integral part of the lease contract to which both parties have agreed. Accord, e.g. *McCullough v. Virginia,* 172 U. S. 102, 124 (1898); *Dorsey v. Clements,* 202 Ga. 820, 824, 44 S.E.2d 783, 787 (1947); 17 Am.Jur.2d *Contracts* § 257. While the procedure does provide for a means whereby a tenant can arrest his dispossession and secure judicial review of the matter, the same consideration of avoiding deprivation of property rights and irreparable fiscal loss

to the owner of the premises has led the General Assembly to require that a tenant desiring to remain in possession during litigation post bond, payable to the owner, for such damages as may be recovered against him on trial of the case. This is accomplished by Ga. Code Ann. § 61-303, which provides:

> "61-303. *Arrest of proceedings by tenant; counter-affidavit and bond.* — The tenant may arrest the proceedings and prevent the removal of himself and his goods from the land by declaring on oath that his lease or term of rent has not expired, and that he is not holding possession of the premises over and beyond his term, or that the rent claimed is not due, or that he does not hold the premises, either by lease, or rent, or at will, or by sufferance, or otherwise, from the person who made the affidavit on which the warrant issued, or from anyone under whom he claims the premises, or from anyone claiming the premises under him: Provided, such tenant shall at the same time tender a bond with good security, payable to the landlord, for the payment of such sum, with costs, as may be recovered against him on the trial of the case."

Tenant-appellants, notwithstanding their agreement to this procedure when they entered into their lease contracts, now claim that they should not be bound because (they allege) the bond posting requirement of the above code section is unconstitutional.

While it seems to the State of Georgia to be a strange "constitutional right" which would allow one citizen to launch his personal war on poverty by expropriating the property of another citizen, this apparently is what tenants argue. They claim that the bond posting requirement of Ga. Code Ann. § 61-303 invidiously bars tenants, particularly indigent tenants, from contesting

their dispossession in court. It is said that this denial of access is violative of rights secured to said tenants under the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

In showing that tenants' contention overlooks the fact that a landlord too has constitutional rights (including the "due process" right not to be deprived of his property without compensation) and in urging that the bond provision is an entirely reasonable means of protecting this interest against wrongful expropriation by tenants (whether the tenants are indigent or merely indignant) we think it is probably appropriate to commence by observing that if tenant-appellants' contentions really go so far as to maintain that *any* bond posting requirement as a requisite to judicial relief is *per se* unconstitutional if and when the prospective litigant is without means to furnish same, their position would be so devoid of merit as to be essentially frivolous.

Bond posting requirements are quite generally employed as a limitation on the right of access to both the Federal courts and the State courts. See e.g., 31 U.S.C. § 518 (injunction to stay distress warrant); 29 U.S.C. § 107 (temporary injunction in labor disputes); 28 U.S.C. § 1446 (removal of cases); Ga. Code Ann. § 37-1403 (security bond double the value of plaintiff's claim in *ne exeat*); Ga. Code Ann. § 82-202 (forthcoming bond double the value of the property in possessory cases); and Ga. Code Ann. § 46-401 (dissolution bonds in garnishment). And it has long been settled that the Fourteenth Amendment does not prevent a State from prescribing reasonable and appropriate conditions

precedent to the seeking of judicial relief through legal proceedings of a specified kind or class *so long as the basis of the distinction is real and the condition imposed has a reasonable relation to a legitimate object.* E.g., *Jones v. Union Guano Co.*, 264 U.S. 171, 181 (1924) (where a farmer was required to obtain a chemical analysis, obviously an expense, as a condition precedent to suing a fertilizer company for crop damage); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) (where a New Jersey statute required small stockholders bringing derivative actions to give security for reasonable expenses of the defendants, including counsel fees); see also, 16 Am.Jur.2d *Constitutional Law* § 535; 16A C.J.S. *Constitutional Law* § 559, p. 507. In *Cohen v. Beneficial Loan Corp., supra,* at p. 552, this Court pointed out that:

> "A state may set the terms on which it will permit litigation in its courts . . . and it cannot seriously be said that a state makes such *unreasonable* use of its power as to violate the Constitution when it provides liability and security for payment of *reasonable* expenses if a litigation of this character is adjudged to be unsustainable. It is urged that such a requirement will foreclose resort by most stockholders to the only available judicial remedy for the protection of their rights. Of course, to require security for the payment of any kind of costs or the necessity for bearing any kind of expense of litigation, has a deterring effect. But we deal with power, not wisdom; and we think, notwithstanding this tendency, it is within the power of a state to close its courts to this type of litigation if the condition of reasonable security is not met."

So far as the State of Georgia is aware, the same conclusion has been reached in all other judicial decisions

involving like questions of bonds, security or cost deposits as a condition of litigation, see e.g., 20 Am.Jur.2d *Costs* § 37; 20 C.J.S. *Costs* §§ 125-127, with an especially good analysis and review of authority being given by the Supreme Court of Idaho in *Pigg v. Brockman*, 79 Idaho 233, 314 P.2d 609, 611-14 (1957).

We think it necessarily follows that the true question presented by tenants' constitutional contention is not whether bond posting requirements can be sustained as to individuals who happen to be unable to furnish the same, but is instead whether the particular bond posting requirement of Ga. Code Ann. § 61-303 is a *reasonable means* to achieve the obviously legitimate legislative end or objective of safeguarding a landlord's valuable property rights from irreparable loss through wrongful expropriation by a tenant.

In dealing with this core question it seems to Appellant that an understanding of the bond requirement is facilitated through a brief review of its historical antecedents. Starting with the common law, the situation was one where notwithstanding the sometimes appalling wear and tear upon tenants, the property owner was permitted to use such force as was necessary to physically remove them from the premises if they were wrongfully in possession and refused to vacate. See, e.g. *Entelman v. Hagood*, 95 Ga. 390, 22 S.E. 545 (1894); 36 C.J. *Landlord & Tenant* § 1761. This was, of course, hardly a unique approach under the common law. The "self-help" doctrine was used in numerous situations and it may well be pointed out that in some instances it remains with us today. So far as we are aware, a trespasser, as well as the man who comes to dinner and then

refuses to depart, may even in this sometimes civilized age be removed by the owner *vi et armis*. 6 Am.Jur.2d, *Assault and Battery* § 168.

This is not to suggest that the tenant was a mere serf sans right or remedy under the common law. In the case of a wrongful eviction he had, in addition to his obvious right to sue the landlord for breach of the lease contract, a cause of action in tort. See *Mizell v. Byington*, 73 Ga. App. 872, 875, 38 S.E.2d 692 (1946); *Yopp v. Johnson*, 51 Ga. App. 925(1), 181 S.E. 596 (1935) [Cert. denied]. While it is quite true that both remedies can be criticized in that they do not serve to prevent the inconvenience nor injury of dispossession to the tenant before it is inflicted, this too is but the customary common law norm of providing for compensation *after* the injury.[3] Moreover, it must be remembered in landlord-tenant disputes that the property is owned by the landlord and not by the tenant. The latter's interest is ordinarily usufructuary only, Ga. Code Ann. § 61-101, and it presumably would have been as usual at common law as it is today for the lease agreement to contain a re-entry clause to protect the property owner against the tenant's default regarding such conditions of the lease as rental payments. We sincerely doubt that adherence to the common law rule would violate the Constitution, and in arguing before the trial court, counsel for tenant-appellants as a matter of fact quite frankly conceded

[3]If the tenant were to be forewarned of his impending eviction, on the other hand, he would also have been able to restrain his eviction in equity, provided that proper grounds for such equitable relief could be shown. See, *Sims v. Etheridge*, 169 Ga. 400(1), 150 S.E. 647 (1929); *Huff v. Markham*, 71 Ga. 555 (1884).

that Georgia had no constitutional obligation to abrogate the common law rule either through adoption of a statutory dispossessory proceeding or otherwise.

This being so, we have some difficulty in seeing just how the creation by statute of *a new and additional remedy for tenants* in dispossession situations (i.e. additional to their admittedly constitutionally sufficient common law remedies) could conceivably be in violation of the constitutional rights of the benefited class merely because the new and additional remedy is conditionally, rather than absolutely, available.[4] As we see it, the General Assembly could constitutionally have provided by statute for eviction by the sheriff upon the property owner's affidavit without any provision at all for arrest by the tenant. As harsh as this might have been, it would still have amounted to an improvement over the tenant's lot at common law in that an officer of the law, being more apt to be impartial about the matter than the property owner, would be less apt to use excessive force or cause physical injury to the tenant in the course of removing him than would be the situation where the eviction is by the hand of the landlord or his hired "strong arms."

But while the General Assembly could have stopped here (just as it could have retained the common law rule of "self-help"), it in fact went further in the ten-

[4]It should not be overlooked that in providing for this new and additional right for the tenant the General Assembly took away the valuable common law right of the property owner to use such force as was necessary to secure immediate compliance with his demand upon the tenant to vacate. See *Entelman v. Hagood*, 95 Ga. 390, 22 S.E. 545 (1894).

ant's behalf. It provided that the tenant could actually retain possession of the owner's property pending judicial decision by filing a counter-affidavit and posting bond (i.e. Ga. Code Ann. § 61-303).

We have already alluded to the very real necessity of a bond or some equally stringent pecuniary requirement as a condition to a tenant's retention of possession pending adjudication of the matter by the courts. In the absence of such protection or guarantee to the owner to the property, a tenant would be in position to receive perhaps six months or more free rent upon even the most frivolous, bad faith defense. In such event the property owner, particularly where the tenant truly is indigent, would in all probability be deprived of any possibility whatsoever of recovering his loss. Nor would simple payment of the rent into the registry of the court afford adequate protection in all cases. Such continued rental payments would be of little solace to the property owner in "hold over" situations, particularly where the owner may be being deprived of a higher use of the property. Nor can it be over-emphasized where as here the controversy is one growing out of a contractual relationship, that *payment into the registry of the court is not what the parties agreed to.* In the absence of any provision to the contrary in their lease contracts (and tenant-appellants have neither alleged nor shown any contrary provision) the relevant dispossessory statutes of the State of Georgia are integral parts of the contracts to which they have agreed. See *Dorsey v. Clements,* 202 Ga. 820, 824, 44 S.E.2d 783, 787 (1947); Accord, *McCullough v. Virginia,* 172 U.S. 102, 124 (1898); 17 Am.Jur.2d *Contracts* § 257.

Surely the position of tenant-appellants in the situation presently before the Court is superior to that of the plaintiffs who urged a similar "lack of access" argument in *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). There it appeared that the security requirement might foreclose resort by the affected plaintiffs "to the *only* available judicial remedy for protection of their rights." 337 U.S. at p. 552. Here the statutory procedure of arresting dispossession through counter-affidavit and the posting of bond, a procedure which tenant-appellants consented and agreed to when they executed their lease contracts, is but one of several alternative remedies available to a tenant. As already pointed out, he could recover damages for his wrongful dispossession either in contract or in tort (with the ever-present possibility of punitive damages in the latter), and in an appropriate case he might be able to restrain his eviction by proceeding in equity.[6]

The situation, in other words, is one of balancing the risk of what in many cases would be an absolutely irreparable injury to one class of citizens, to wit: owners of rental property, against the risk of injury which clearly is compensable and *not* irreparable to another

[6]While equity will not ordinarily interfere with statutory remedies to collect rent and recover property, and while inability to post bond would not *ipso facto* afford grounds for equitable relief in Georgia, e.g., *Flynn v. Merck*, 204 Ga. 420, 49 S.E.2d 892 (1948), it is equally clear that should other equitable issues be involved (e.g., fraud on the part of the landlord), the tenant would have a remedy in equity which could well include the enjoining of the prosecution of a dispossessory warrant. See e.g., *Sims v. Etheridge*, 169 Ga. 400(1), 150 S.E. 647 (1929); *Huff v. Markham*, 71 Ga. 555 (1884). *Accord, Flynn v. Merck, supra*, at p. 424.

class of citizens, to wit: tenants. We think that under the circumstances the balancing of such risks to each of the two classes of private citizens which is provided in Ga. Code Ann. § 61-303, including the bond posting requirement therein, is a reasonable means for the General Assembly to achieve the undoubtedly legitimate legislative end or objective of safeguarding the valuable property rights of the owner from irreparable loss through wrongful expropriation by a tenant. Nor is the General Assembly of the State of Georgia unique in this approach to the problem. See, e.g., Burns Indiana Statutes Annotated § 3-1306.

In concluding discussion of the constitutionality of Ga. Code Ann. § 61-303, we wish to point out that we do not overlook such cases as *Griffin v. Illinois,* 351 U.S. 12 (1955); *Burns v. Ohio,* 360 U.S. 252 (1959); and *Smith v. Bennett,* 365 U.S. 708 (1961). It is our position that these cases, all of which involve issues of the State's imposition of a price tag upon the personal liberty of persons convicted of a crime and desirous of having their conviction reviewed, are simply not apropos to the instant situation which involves a legislative attempt to balance the risk of injury likely to be incurred by one or the other of two classes of citizens having opposed economic interests. The difference has been noted by a unanimous three-judge United States District Court in *Willie Williams and Sam Martin, etc. v. T. Ralph Grimes,* Civil Action No. 10025 (N. D. Ga., decided April 18, 1966) [unreported], where with specific reference to the attacked bond posting requirement of Ga. Code Ann. § 61-303, the court observed: ". . . the bond requirement is entirely reasonable for the vast majority

of cases." Nor is *Hovey v. Elliott,* 167 U.S. 409 (1897) pertinent. There the situation involved a price tag upon the right of an individual to present his defenses in an adversary proceeding against him (i.e. where the defendant had been brought into court *against his will*). Here, it is the *tenant* who seeks (a) to obtain adjudication by the court, and (b) the immediate affirmative remedy of being allowed to retain possession of another's property during the course of the litigation. That the tenant is named as the "defendant" in the summary and ordinarily unlitigated statutory dispossession procedure does not make the situation analogous to *Hovey*. The Constitution is concerned with substance and not mere form. Here it is the tenant, notwithstanding the fact that he is labeled as the "defendant" *in the dispossessory warrant,* who initiates actual litigation. It is in reality the property owner who is brought into court against his will. In any event, it is quite generally held that fiscal requirements such as bonds may be required of defendants just as they are of plaintiffs in situations where the defendant seeks affirmative relief and thereby assumes the position of a plaintiff. See 20 Am.Jur.2d, *Costs* § 37. Nothing in *Hovey* is to the contrary.

Finally, we respectfully suggest to the Court that unlike the above discussed decisions, a case which does have relevance to the present situation is *Johnston v. Byrd,* 354 F.2d 982 (5th Cir. 1965). There an indigent plaintiff claimed she was being deprived of her "due process" and "equal protection" rights by an Alabama statute requiring her to post bond in an amount double the value of the property involved, in order to restrain

sale of that which was alleged to be *her own property* wrongfully seized in connection with the execution of a judgment against her husband. The action was dismissed with Judge Rives, in a concurring opinion, stating that the bond requirement was entirely reasonable and that the plaintiff's constitutional claim was insubstantial and no more than a colorable attempt to obtain Federal jurisdiction. We think the constitutional contentions of tenant-appellants are equally insubstantial here and that the Supreme Court of Georgia was entirely correct in rejecting the same.

2. *The "double rent" measure of damages set forth in Ga. Code Ann. § 61-305 is a reasonable method of protecting valuable property rights of owners of rental property against irreparable injury and is not violative of any rights secured to a tenant, indigent or otherwise, under the "due process" or "equal protection" clauses of the United States Constitution.*

Ga. Code Ann. § 61-305 provides:

> *"Double rent and writ of possession, when.* — If the issue specified in the preceding section shall be determined against the tenant, judgment shall go against him for double the rent reserved or stipulated to be paid, or if he shall be a tenant at will or sufferance, for double what the rent of the premises is shown to be worth, and such judgment in any case shall also provide for the payment of future double rent until the tenant surrenders possession of the lands or tenements to the landlord after an appeal or otherwise; and the movant or plaintiff shall have a writ of possession, and shall be by the sheriff, deputy, or constable placed in full possession of the premises."

Much of what has already been stated concerning the

necessity and constitutionality of the bond posting requirement of Ga. Code Ann. § 61-303 is equally true of the "double rent" measure of damages set forth in Ga. Code Ann. § 61-305. Again there is the legislative attempt to balance the risk of what in many cases would be an absolutely irreparable loss to one class of citizens, to wit: owners of rental property, against the interests of and risks to another class, to wit: tenants. In fixing the measure of damages, we think the legislature has acted well within its constitutional limits in recognizing that the fiscal injury to the property owner whose property has been wrongfully held by a tenant, frequently if not almost always exceeds the bare rent or rental value. In addition to lost rent, the owner is faced with the expense of litigation and the fact that a tenant, who in addition to being unhappy with his landlord probably realizes that he ultimately will be required to vacate, cannot be expected to use his best efforts to avoid waste or properly maintain the property. Then too there is the expense of securing a new tenant and preparing the premises for his occupancy. Under the circumstances we think that Ga. Code Ann. § 61-305, as Ga. Code Ann. § 61-303, is an entirely reasonable means for the General Assembly to seek to achieve the undoubtedly legitimate legislative objective of protecting the valuable property rights of a landlord from irreparable loss at the hands of the tenant who wrongfully remains in possession.

We think there is little merit in the suggestion that a statutory measure of damages cannot take into consideration such difficult-to-ascertain items. To the contrary, statutes providing for double or even treble dam-

ages are relatively common in both the State and Federal systems, see e.g., 25 C.J.S. *Damages* § 128; 22 Am.Jur.2d, *Damages* § 267, one conspicuous example being the Clayton Act's allowance of treble damages for injuries caused by either intentional or unintentional violations of the Antitrust laws. 15 U.S.C. § 15. In *Missouri Pacific Railway Co. v. Hames,* 115 U.S. 512, 516-17 (1885), the United States Supreme Court rejected "equal protection" and "due process" attacks upon a State statute providing for multiple damages, holding such legislation to be constitutionally permissible and a matter which addressed itself to the discretion of the legislature. All state supreme courts passing on the question would appear to have reached the same conclusion. See e.g., 22 Am.Jur.2d, *Damages* § 267, p. 362 (citing numerous cases). In situations where one person has continued to wrongfully possess the property of another it is hard to fathom how the minimal protection and compensation which the statute provides for the property owner could be said to be unconstitutional.

CONCLUSION

Rights guaranteed by the "equal protection" and "due process" clauses of the Fourteenth Amendment should protect the affluent as well as the indigent. The State of Georgia believes that owners of rental property (not all of whom are wealthy slum landlords and many of whom have their own mortgage payments to meet) are also entitled to certain minimal protection regarding their property rights and further believes that the means chosen by its General Assembly to provide for protection of such rights at the time the General Assembly abrogated the owner's valuable "self help" right under the common law, is at the very least one appropriate means of affording such protection. Appellants agreed to this procedure at the time they entered into their lease contracts with the property owners. We think the unanimous decision of the Supreme Court of Georgia was correct and should be affirmed.

Respectfully submitted,

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No. 28

Vide No. 27 for brief amici curiae of The Center on Social Welfare Policy and Law, et al. (filed Oct. 13, 1969)